GERRIT SMITH

ON THE

FUGITIVE SLAVE LAW.

ABSTRACT

OF THE

ARGUMENT

ON THE

FUGITIVE SLAVE LAW,

MADE BY

GERRIT SMITH,

IN SYRACUSE, JUNE, 1852,

ON THE TRIAL OF

HENRY W. ALLEN,

U. S. DEPUTY MARSHAL,

FOR KIDNAPPING.

SYRACUSE:
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ABSTRACT

OF

GERRIT SMITH'S ARGUMENT.

Having closed his introductory remarks, Mr. Smith proceeded to say—It is admitted in the pleadings, that the prisoner had a part in this undertaking to sink his fellow-man into slavery. It is true, that these admissions do not make that part as extensive, as it really was, and as extensive as we should have shown it to be, had we been allowed to produce witnesses. It nevertheless, answers my purpose in the argument, which I am, now, to make, that the prisoner had a confessedly clear and responsible part in this undertaking.

And, now, what is the prisoner's excuse for this high crime against his brother man? It is, that he acted under law, and according to law. Well, if he did, then he is innocent. If not, then he is guilty. I admit, that this is the hinge, on which this case turns. If that is a Constitutional, valid law, under which the prisoner acted, and if he rightly interpreted its scope and claims, then he should be acquitted—and, otherwise, convicted.

It is sometimes, said, that it is unreasonable to require a merely ministerial officer to know what is law. But every man is required, and most reasonably, too, to know what is law. Emphatically true is this in the case of him, who aspires to be, and who comes to be, a minister of the law. We, also, hear it said, that the bare existence of a law should be admitted to be presumptive evidence, that it is Constitutional—such strong presumptive evidence, that the officer may feel entirely free to act upon it. Our reply to this is—that if the law is immoral and wicked, its immorality and wickedness constitute presumptive evidence of its Unconstitutionality. Especially prompt and full should be the presumption, that the law is Unconstitutional, if its immorality and wickedness are flagrant, as in the case of a law for slavery. Not to take this ground is deeply to dishonor the Constitution. If an execution is put into the hands of the sheriff, for the purpose of having him levy on hogs, he may take it for granted, that all is right—for he knows

that hogs are property. But if a process is put into his hands, for the purpose of having him treat a human being as property, and reduce that human being to slavery, then he is bound to pause, and to enquire, whether the law for that process can possibly be a Constitutional, valid law. It is often said, too, that it is hard for an officer to be punished for his ignorance of the law. Yes—but is not his title to our sympathies far weaker than that of the victims of his ignorance? By means of this ignorance, a freeman of the County of Onondaga might be torn from his wife and children to spend his remaining years under the lash of the taskmaster upon a Southern plantation. It is insisted, however, that if an officer act in good faith, his good faith should acquit him of blame, and protect him from punishment. But, there are many authorities to the contrary. I will refer to a few of them .

Says Justice M'Lean [Peter's Reports, x. 94]. "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." In the South Bend (Indiana) fugitive slave case, Justice M'Lean held "that all, who assisted in procuring, with the officer, that served, and the judge, that tried, the writ were trespassers, and liable to the plaintiff in damages * * * * that the discharge of the fugitives by the judge was void, and, consequently, can give no protection to those, who acted under it * * * * that the forms of law assumed afford no protection to any one." Justice Van Ness says [Johnson, xv. 155]: "Every tribunal, proceeding under special and limited powers, decides at its peril—and, hence, it is, that process issuing from a Court not having jurisdiction, is no protection to the Court, to the attorney, or the party, nor even to a ministerial officer, who innocently executes it. This is a stern and sacred principle of the common law, which requires to be steadily guarded and maintained."

Nor is it enough, that a judge or marshal can quote even an Act of Congress as authority for what he has done. Unless the Act is Constitutional, it affords no protection. Said Justice M'Lean, in a letter, which was extensively copied by the press, a year or two since: "An Unconstitutional Act of Congress imposes no obligations on a State or the people of a State; and may be resisted by an individual or a community. No one, I believe, will contradict this." If an Act of Congress direct the judge to direct the marshal to insult the people he meets, neither judge nor marshal can obey it with impunity. Emphatically unsheltered would they be by an Act of Congress, which commands them to enslave people—unless, indeed, such Act should prove to be Constitutional.

It must be remembered, that the officer is required to swear to support not an Act of Congress, but the Constitution.

I will, now, proceed to show, that the law, under which the prisoner acted,

is Unconstitutional, and that he is, therefore, a kidnapper. I will regard the law as intended to apply to slaves, whether it does, or does not, apply to any other class of persons.

My first position is, that the law is Unconstitutional, because it withholds the trial by jury.

The Constitution requires the trial by jury in all criminal prosecutions. Why does it? Because, in such prosecutions, the highest interests of the accused—character, liberty, life—are in peril. Hence, he is entitled to the advantage of a jury trial.

Now, I admit, that the prosecution for the recovery of a fugitive slave is but a civil prosecution. Nevertheless, it is a prosecution, which perils the liberty of the defendant—ay, his liberty for life. Liberty for life, did I say? Oh! this expresses the idea quite too feebly and inadequately. Manhood for life, I should have said. The convict in the State Prison is deprived of his liberty; but not of his manhood. His manhood survives; and is under the full protection of the laws. Should even the Governor of the State visit the State Prison, and lay but his little finger in violence and injustice upon the convict, he would soon be taught that he could not do so with legal impunity. But the prosecution for the recovery of a slave, if it goes against the defendant, sinks him into a chattel, and leaves him not a shred of his manhood, nor the least protection of law.

Manifestly, then, had Congress acted in the spirit of the Constitution, the law in question would have provided the trial by jury for persons claimed under it. *May* Congress, in enacting a law for the recovery of fugitive slaves, provide the trial by jury? All will admit, that it *may*. All will admit, that there is nothing in the Constitution to hinder it. Well, if it *may*, then it *must*—for, in such a case a *may* amounts to a *must*. No one will deny, that, if Congress would take upon itself to enact a law to carry out the Constitutional clause before us, it should enact just such a law, as it would be proper to enact, had the clause gone on, and ended with the following words: "And Congress shall enact a suitable law to carry out this clause." But who, I pray, can call a law *suitable*, which denies a jury to the man, who is on trial for more than his life? Yes, much more than his life—for liberty and manhood are much more than life.

Congress should have enacted, in this case, none but a reasonable law. A palpably unreasonable law, in this case, is an Unconstitutional law. I say not, that every unreasonable law is Unconstitutional;—for there may be unreasonable clauses in the Constitution—clauses calling for unreasonable laws. But this I do say—that, if there is a palpably unreasonable law, which the Constitution does not call for, then does its palpable unreasonableness make it Unconstitutional. We must take this ground, if we would honor reason. We must take this ground, if we would honor the Consti-

tution. I scarcely need add, that the gross unreasonableness of this law, in withholding the trial by jury, is entirely uncalled for by the Constitution.

I need say no more to show, that this withholding the trial by jury violates the spirit of the Constitution. I go on to show, that it violates its letter also.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." [VIIth Amendment of Constitution.] But the amount involved in a suit under the fugitive servant law will generally, if not always, exceed twenty dollars. Moreover, a suit under this law is a suit at common law. That it is such can be proved, in no wise, more conveniently and effectually than by quoting the very words of the S.C. of the U. S., which Lysander Spooner quotes for this purpose. I shall, in other parts of my argument, as well as this, avail myself of the help of this admirable logician, whose writings I warmly commend to all my hearers.

What is a suit? It is the prosecution of a claim. The Supreme Court has so defined it.

In *Cohens* vs. *Virginia*, the court say:

"What is a *suit?* We understand it to be the prosecution, or pursuit of some *claim*, demand, or request. In law language, it is the prosecution of some demand in a court of justice. 'The remedy for every species of wrong is,' says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived." The instruments whereby this remedy is obtained, are a diversity of *suits* and actions, which are defined by the Mirror to be 'the lawful demand of one's right;' or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur*,'—(the form of prosecuting in trial, or judgment, what is due to any one.) Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

"To commence a suit, is to demand something by the institution of process in a course of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand."—6 *Wheaton* 407–8.

Well, is a suit the prosecution of such a claim, as is spoken of in the fugitive servant clause of the Constitution? It is, if that clause refers to slaves. The Supreme Court have said, that it is.

In the case of *Prigg* vs. *Pennsylvania*, the court say—

"He (the slave) shall be delivered up on *claim* of the party to whom such service or labor may be due. * * * A *claim* is to be made. What is a claim? It is in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do, or to forbear to do, some act or thing as a matter of duty. A more limited, but at the same time an equally expressive definition was given by Lord Dyer, as cited in Stowell *vs.* Zouch, Plowden 359; *and it is equally applicable to the present case;* that 'a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in his possession, but which is wrongfully detained

from him.' The slave is to be delivered up on the claim."—16 *Peters* 614-15.

We have, now, gone far enough to learn, that a prosecution for the recovery of a fugitive slave is a suit. It remains to be learned, that it is a suit at "common law." Happily, we can learn this also, from the Supreme Court. That Court gives the meaning of "common law;" and gives it too, as the term is used in the Seventh Amendment of the Constitution:

"The phrase "common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The Constitution had declared in the third article, 'that the judicial power shall extend to all cases in *law* and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority &c., and to all cases of admiralty and maritime jurisprudence. It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. *By common law, they meant what the Constitution denominated in the third article, 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of pubtic law, and of maritime law and equity was often found in the same suit.*" * * * *

"*In a just sense, the amendment, then, may be construed to embrace all suits which are not of equity and admiralty jurisprudence, whatever may be the peculiar form which they may asume to settle legal rights.*"—3 *Peters*, 446.

Perhaps, it will be said, that a jury trial is not due to the fugitive slave, because the value in controversy is not to be measured by dollars—or, in other words, because a man is not property. But the slaveholder surely is estopped from raising this objection;—for, whether the fugitive slave is, or is not, property, the slaveholder, nevertheless, claims him as such. Moreover, the Supreme Court of the U. S. has said, that the prosecution in this case is a prosecution for property—that "the right," in question, "is a right of property." [Peters XVI., 616.]

This denial of the right of trial by jury, together with the very extensive acquiescence in such denial, constitutes, in my esteem, one of the most significant of all the evidences of the progress of despotism in this country—one of the most significant of all the evidences of the growing contempt in this country for human rights. The trial by jury is the greatest defence of the people's rights—the strongest bulwark of their safety;—and, hence this denial of it should produce deep and wide-spread alarm.

"The trial by jury," says Justice Story, [3d Peters, 446] "is justly dear to the American people. It has always been an object of deep interest and

solicitude; and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated with and secured in every State Constitution in the Union. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the 7th Amendment.

But it may be said, that the enactors of this law intended to deny the jury trial to the black race only. Alas, what an outraged race it is! In the words of the prophet Isaiah, "This is a people robbed and spoiled. They are all of them snared in holes, and they are hid in prison houses. They are for a prey, and none delivereth; for a spoil, and none saith, restore."—Such, doubtless, was the intention. Indeed, had the intention been to deny it to the white race also, scarcely would the lives of the enactors have been safe from the fury of that haughty race. This distinction between one portion of the American people and the other, although a stupendous crime, at which all should stand aghast, is, nevertheless, acquiesced in, and approved, by this superlatively guilty nation.

This law does, in its terms, apply to both whites and blacks, and exposes both to its penalties. What, however, if the public sentiment is such, as to confine its operation, for the present, to the blacks?—will not the denial of the right of trial by jury to one race of our citizens prepare the way for denying it to every other race of our citizens?—and will it not hasten the day, when this right shall be cloven down in every part of our land, and denied to every class of our people?

My second position is, that the law is Unconstitutional, because the Commissioner is not authorized by the Constitution to do what the law requires of him.

The law invests him with a judicial office—a judicial office in the eye, and in the meaning, of the Constitution. It requires him "to hear and determine the case."

But discerning men, who desire to uphold the law, and who see, that the investing of the commissioner with a judicial office, is necessarily fatal to the Constitutionality of the law, deny, that he is thus invested. They hold, that "the trial," "the adjudication," is to take place in the State, whence the fugitive escaped; and that, in this respect, the fugitive servant clause of the Constitution and the fugitive-from-justice clause of the Constitution are alike. But whilst the latter clause expressly provides, that the trial shall be in the State, whence the fugitive escaped, the former clause does not express such a provision, nor imply it, nor, in the remotest degree, hint at it. The fugitive servant is to be delivered up to the person, to whom, when his "claim" is examined, the servant is found to owe service: and, if the servant is a slave, then his master can sell him forthwith—and that, too, even

though half a dozen States intervene between the slave State in which he is arrested, and the slave State from which he fled. But the fugitive from justice is delivered up, not after it is ascertained, that he is guilty of the offence charged against him; but that it may, in another jurisdiction, be ascertained, whether he is guilty of it. The fugitive of the one clause is to be delivered up, because he has been tried and convicted. But the fugitive of the other, if, as is generally the case, he fled before conviction, is to be delivered up for trial—and is, therefore delivered up as an innocent person, and an innocent person he will remain, in the contemplation of law, until he has been tried and found guilty.

It is, nevertheless, held, that the trial of the fugitive servant in the State to which he has fled, is but a preliminary trial, and that his decisive trial is, according to the theory of the case, to be in a State Court, in the State from which he escaped. Our answer to this, is—First, that we see no propriety in calling that a preliminary trial, which is a comprehensive and conclusive one—a comprehensive and conclusive one so far as investigating and passing upon all the questions in the whole case can make it such. Second, that the trial under the Federal and paramount government, would operate as an estoppel to the institution of a suit in the State Court; or, at least, that the trial, under that government, could be effectually plead in bar on the trial in the State Court; for, surely, if it is competent for a Federal Court to decide, that A. B. is the slave of C. D., it cannot be competent for a State Court to reverse that decision. Third, that the law of 1850, claiming, as it does, that the Federal Government has exclusive jurisdiction of this case, does not presume, and could not presume, on any auxiliary or supplementary action, at the hands of another sovereignty. It must itself make a complete provision for the demands of the case. It, clearly, has no Constitutional right to rely on foreign agencies to do any part of its own work. Moreover, if there are, today, State laws, which authorize a further trial in this case, they may, nevertheless, be repealed tomorrow. And what goes still further to forbid all reliance on State action to complete that, which the Federal Government has left undone, is that, on the question, whether a person is a slave, there is, in reality, no adjudication in any of the slave States. For, in none of those States, is a person claimed to be a slave, unless he is also claimed to be a colored person; and, in none of those States, is a colored person allowed to call colored witnesses, where the other party is a white person. Now, that would be but a mockery of the adjudication of rights, where persons are forbidden to testify, because their hair is white, or their eyes are blue. But the mockery in that supposed case would not surpass the mockery in this actual case.

It was, however, unnecessary for me to go into this argument, if what

the S. C. of the U. S. has said on the point before us may be taken as conclusive authority.

"It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognized or asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a *controversy* between the parties, and a *case* arising under the constitution of the United States; *within the express delegation of judicial power given by that instrument.*"—*Prigg vs. Pennsylvania*, 16 *Peters*, 616.

That Justice Story, who delivered this opinion of the court, had, ten years previously, expressed in his Commentaries [Vol. iii. 677] an opposite doctrine on this point, is neither material nor surprising. It is not material—for, besides, that his authority, as a judge of the S. C. of the U. S., is quite equal to his authority as a commentator, his authority, as a judge, is in this instance, fortified by that of his associate judges. And his self-contradiction, in this instance, is not surprising—for he has far more than matched it in this very Prigg case.

When writing that part of his Commentaries just referred to, Justice Story was, as a Northern man, endeavouring to convince the South, that she has nothing to complain of; and that it is "a delusive and mischievous notion, that the South has not, at all times, had its full share of benefits from the Union:" but when he came to write the Opinion of the Court in the Prigg case, he was a "Northern man with Southern principles." He was, then, aware, that the rule of interpretation laid down in his Commentaries [Vol. i. 387, and Vol. ii. 534], and so emphatically concurred in by Kent in his Commentaries [Vol. i. 243, 3d edition,] was fatal to a pro-slavery construction of the Constitution: and, hence, he put forth a new and entirely different rule of interpretation. In his Commentaries he says, that the interpreter must adhere to the letter of the Constitution, and that "nothing but the text itself was adopted by the people;"—but, in the Prigg case, he bids the interpreter quit the certainty of the letter to launch forth upon the uncertainty of history! Peters xvi, 610.

With few exceptions, and Justice Story was not one of them, the great men of our country have fallen down at the feet of the slave power, no matter how much of self-respect or self-consistency, the prostration has cost them.

No more need be said to show, that the law requires from the commissioner the work of a judge. The only other question, is whether the commissioner is a judge—a Constitutional judge.

The fact, that the commissioner is apppointed by a judge proves, that he is not a judge. Surely, surely, the Constitution recognizes no such monstrous doctrine, as that one judge can appoint another judge. The proceedings of the appointee might come up for review before the appointer;

and to prove the wisdom of his selection, as well as to save uninjured the reputation of his favorite, the appointer might be strongly tempted to make his review a very partial and tender one.

I readily admit, that a court may apppoint officers to take testimony, and to perform acts in aid of a court. But, I cannot admit, that a court may appoint a court. The commissioner's court, however, is as truly, and indedently, and emphatically, a court, as is the S. C. of the U. States.

The fact, that the commissioner is paid in fees for his services does also, and does conclusively, prove, that he is not a Constitutional judge. The Constitutional judge receives a salary for his services. Is it said, that this point, at which the law of 1850 is Unconstitutional, is unimportant? It is, on the contrary, very important. The manifest object of the Constitution, in paying the judge a salary, is to secure his impartiality and uprightness. Were he paid in fees, he would be under temptation to favour plaintiffs—for he could not be ignorant, that plaintiffs are apt to select the court, which is known to favour plaintiffs, and are apt to multiply suits, if they can have such a court to take them to.

But it may be said, that the Constitution authorizes Congress to "vest the appointment of such inferior officers, as they think proper, in the courts of law." For the reasons already given, however, the commissioner cannot be one of these "inferior officers." The services of a judge are required of him; and no person can be a Constitutional judge, who receives his judgeship from a judge, or who receives his compensation in fees. Moreover, the commissioner cannot be one of these "inferior officers," for the reason, that he is not an inferior officer. Call him an inferior officer, who has concurrent jurisdiction with the judges of the S. C. of the U. S.?—and, that too, in a class of cases more important than any other class of cases, which can come before an earthly tribunal?—for, I hold, that there is no other class of cases so important, as that, in which the question is, whether a man shall be left upon the heights of manhood, or be cast down into the depths of brutehood and chattelhood. I doubt not, that the enactors of this law regarded the commissioner as an inferior officer. For, inasmuch as they took it for granted, that the law would bear upon negroes only—a race of men, for whose rights they had no more respect than for the rights of dogs--they saw not the rank and dignity of a judge in him, whom their law called to the office (in their eyes, very low office), of disposing of the fate of negroes. Again, can you call him an "inferior" officer, who, in another important respect also, is the equal of the judge of the S. C. of the U. S.?--he, as well as such judge, holding his office during good behavior, or, in other words, for life? For, if the commissioner is really a judge--a judge Constitutionally, as well as in the nature and services of his office--then, whatever else to the contrary, he does, by the paramount authority of

the Constitution, hold his office for life;—ay, and, by that same authority, he can, should the calls of kidnappers for his kidnapping services become infrequent, demand a salary, in lieu of his infrequent fees. Here is our commissioner Sabine, who issued the warrant for poor Jerry--his modesty may be all unconscious of the honor--nevertheless, if he will but know it he is, if a Constitutional officer at all, a U. S. judge for life, and entitled, thereby, to claim a salary for life. Again, is it fit to call him an "inferior" officer, who, not only, has the most important of all cases brought before him, but whose decision upon those cases is conclusive and final?

My third position is, that the law is Unconstitutional, because it offers a bribe.

To say, that a law, which offers a bribe, is Constitutional, is to cast great reproach and insult upon the Constitution.

Now, that this law is guilty of bribery is too plain to need argument. Its bribery is open and shameless. In Bible language, it "declares its sin, as Sodom, and hides it not." And it is bribery, too, in behalf of the worst of causes and the worst of men. It is bribery for slavery against liberty. It is bribery for the slaveholder against the slave: for the rich against the poor: for the strong and influential against the weak and helpless. This law offers to the commissioner twice as much money, if he will go wrong, as if he will go right: twice as much, if he will favor the proud and oppressive, as if he will show mercy to the sad and crushed; twice as much, if he will decide for the rich plaintiff, as for the poor defendant.

Where, where, in all the wide world, can another statute be found so infamous and infernal, as this?

My fourth position is, that the law is Unconstitutional, because it allows the suits under it to be decided solely on affidavits.

These are suits at the common law: affidavits are unknown to the common law: and, yet, these suits are to be decided solely on affidavits!

A man is not suffered to lose his horse, or even his dog, on mere affidavits. How much less should he be suffered to lose himself on mere affidavits! What a gross outrage on human rights to authorize a magistrate to sweep them all away by the force of mere affidavits!—and how palpably does the law, which authorizes this gross outrage, violate the Constitution!

I will read an able authority to show how very inadequate and uncertain a means of arriving at the truth is an affidavit, compared with the presence of the witness, and his free examination by both parties.

Justice Livingston says: "The right of cross examining is invaluable, and not to be broken in upon. How often is testimony, which, when first delivered, appears conclusive and irrefragable, entirely frittered away by this process! So much so, that a witness well sifted, not unfrequently proves more against than in favor of the party, that produces him. If one eye witness be worth more than ten ear witnesses [Pluris est oculatus testis

unus quam auriti decem] a still higher value must be set on proofs made in presence of both parties, compared with exparte declarations. In one way, the whole truth comes out; in the other, no more than it may suit the witness or his friend to have disclosed. The not being under oath, although a serious objection, is not with me the greatest: because, admitting everything said to be true, so long as it is in the absence of one, and probably at the solicitation, of the other party, it should go for nothing." Johnson ii., 35.

My fifth position is, that the law is Unconstitutional, because it provides for disposing of the cases under it by exparte testimony.

The law provides for admitting testimony on the plaintiff's side only. It makes no provision whatever—not even by the slightest implication—for the reception of testimony, even rebutting testimony, from the defendant's side. Commissioner Morton of New York has been much blamed for refusing to hear testimony on the side of Horace Preston, whom he recently sent into slavery. Nevertheless, it must be admitted, that this refusal is fully justified by the law. It is in harmony with both its letter and spirit. Commissioner Morton was as good as the law. He showed what the law is.

This Unconstitutional feature of the law is all the more glaring from the fact, that the exparte testimony, for which the law provides, and which the law pronounces sufficient, is of the weakest kind—being mere affidavits.

I said, that the law makes no provision for receiving testimony on the defendant's side. Not only is this so, but it does, in effect, ay, and even expressly also, exclude testimony on his side. 1st. It does, in effect, exclude such testimony, by the "summary manner," in which the law requires the case to be disposed of. The plaintiff may take months to prepare for trial. But the defendant is not entitled to a moment. To the rich and strong and oppressive plaintiff the law accords all this advantage. But from the poor and helpless defendant the law withholds it. Toward that wronged and wretched one its heart is as hard and unyielding as adamant. 2d. It expressly excludes testimony on the defendant's side, by expressly excluding his testimony. But is not a defendant as worthy of belief as a plaintiff? Is not the oath of the servant as good as the oath of the master? Is not the oath of the ignorant man as good as the oath of the learned man? Is not the oath of the poor man as good as the oath of the rich man? What a distinction is this to set up in a republican and christian land!—a land of republican and christian equality!

"A case in law or equity," says the S. C. of the U. S., "consists of the right of one party, as well as the other." Wheaton vi, 379.

Lysander Spooner asks: What is this "right" which is at the same time "the right of one party, as well as of the other?" It cannot be a right to

the thing in controversy; because that can be the right of but one of them. The "right," therefore, that belongs to "one party as well as the other," can be nothing less than the equal right of each party to produce all the evidence naturally applicable to sustain his own claim, and defeat that of his adversary; to have that evidence weighed impartially by the tribunal that is to decide upon the facts proved by it; and then to have the law applicable to those facts applied to the determination of the controversy.

Is it said, that the commissioner may allow testimony on the defendant's side? He certainly cannot, without violating the spirit, tenor, and purpose of the law. What, however, if he could? No thanks to the law for it. The law does not oblige him to do so:—and if he does so, it is of his own mere favor and grace.

How does this trial of a man for his liberty by mere exparte testimony agree with the great Constitutional protection: "No man shall be deprived of his life, liberty, or property, without due process of law?" Perhaps, it will be said, that the slave is not a party to the Constitution; and that, hence, this great Constitutional protection is not vouchsafed to him. We will see, under another head, that the slave is a party to the Constitution, and that all, who were permanent inhabitants of this land, at the time the Constitution was adopted, were parties to it. Admit, however, that the slave is not a party to the Constitution, and is not entitled to protection under it. Why, however, should such admission exclude from this protection the person, who is claimed as a slave? The very thing to be proved is whether he is a slave: and, surely, therefore, this very thing should not be assumed. As the person arraigned for crime is to be held to be innocent, until he is proved to be guilty; so the person, arraigned as a slave, should be held to be a freeman, until he is proved to be a slave. Now, to assume, that the person, seized as a slave, is a slave; and, then, on the strength of this assumption, to deny him, when on trial, the safeguards, which the Constitution provides, is a glaring and revolting specimen of that circular logic, which is entitled to produce no conviction, save that of its own folly and absurdity.

My sixth position is, that the law is Unconstitutional, because it vests judicial power in State Courts.

It does this in the face of various decisions of the S. C. of the U. States and other courts. I will quote from a few of these decisions.

"If, then, it is a duty of Congress to vest the judicial power of the U. States, it is a duty to vest the whole of it. * * * Congress cannot vest any portion of the judicial power of the U. States, except in Courts ordained and established by itself. * * * Congress have legislated upon the supposition, that, in all the cases, to which the judicial powers of the U. States extended, they might rightfully vest exclusive jurisdiction in their own Courts." Wheaton 1: 330–337.

Chief Justice Spencer, in delivering the Opinion of the S. C. of the State

of N. York, concurs emphatically with the S. C. of the U. States in the case, which I have just quoted.

"The State Courts are not ordained, nor established, by Congress, and are not amenable to that body. The judiciary of a State is a constituent part of another and an independent sovereignty, from which they receive their authority and support, whose laws they are bound to execute. But they are under no such obligations to the U. States, whose laws they are bound to obey as citizens, but not to execute as magistrates." Connecticut Reports VII: 243.

The law is grossly Unconstitutional in this respect, inasmuch as it makes the action of the State Court mandatory and conclusive upon the Federal Court on two of the three points to be established, and sufficient on the third point also, if but the Federal Court shall acquiesce in the sufficiency. Let it not be said, that the action of the Southern judge is ministerial rather than judicial. It is emphatically judicial. He is a judge in the case. He does not take testimony to be passed upon by, or to satisfy, the Northern judge; but to be passed upon by, and to satisfy himself; and his satisfaction is, as we have seen, sufficient and final on two of the three points in the case.

My seventh position is, that the law is Unconstitutional, because of its interference of the legislative with the judicial department of Government.

The law is guilty of this interference in enjoining "a summary manner" of trial, and in prescribing a poor kind and a small amount of evidence.

"The judicial is a branch of the government co-ordinate with the legislative and executive. Justice Story, speaking of the 3d Article of the Constitution, says: "It is the voice of the whole American people, solemnly declared, in establishing one great department of that government, which was, in many respects, national, and, in all, supreme." Wheaton 1: 328.

The legislature is to make the laws: but it does not follow, that it is authorized to control the judicial administration of them. What if the legislature has, hitherto, been allowed to encroach upon the judicial? It is not, therefore, to be allowed to continue its encroachments. Prescription cannot be justly claimed for them.

In no respect should the legislative be allowed to override the judicial—least of all, in respect to the kind and amount of the evidence—the evidence being so vital a part of the lawsuit. Again, if in one class of cases, the legislature may dictate to the judiciary to receive testimony on one side only, why may it not do so in cases of every class? And, if it may dictate so far, why may it not forbid all testimony?

Suppose Congress should be disposed to arm itself with despotic power, and should, to this end, enact laws in palpable violation of the Constitution. Suppose, farther, that in order to prevent the judiciary from declaring such laws Unconstitutional, it should enact, that the only testimony, on which the judiciary may declare a law Unconstitutional, is the confession of

the members of Congress, that they knew the law to be Unconstitutional, when they voted for it. I ask, would not that be an encroachment of the legislative upon the judicial? All would admit it. Nevertheless, would that liberty of the legislative with the judicial exceed the liberty, which has been taken in the present case?

Is it said, that the lawmaking power may regulate the judicial administration of the laws? But, if it may *regulate* it, it does not follow, that it may *annihilate* it. To *regulate* is one thing. To *annihilate* is another, and a very different thing. But for the legislative to claim the right to dispose, as it will, of the evidence in the case, is virtually to claim the right to *annihilate* the judicial administration of the laws.

It is high time, that the American judiciary had asserted its independence of the legislature, and its equality with it. It is high time, that it had set its foot down against the encroachments of the legislature. An independent, self-respecting, incorrupt, and incorruptible judiciary, is a nation's safety and glory. But a servile judiciary—a judiciary, which allows itself to be moulded at the will of the legislature, is a nation's curse and disgrace.

If we must part with the legislature or judiciary, it had better be the former. Instead of consenting to the virtual annihilation of the judiciary, we might rather be looking forward to the day, when, under a higher and holier civilization, the legislature, instead of the judiciary, may, as in the Jewish Theocracy, be dispensed with.

My eighth position is, that the law is Unconstitutional, because it requires no testimony.

I have shown, that the law provides, that the case may be wholly disposed of on affidavits:—and I have, also, shown, that it provides, that it may be wholly disposed of on exparte testimony—and, that too, of the weakest kind, mere affidavits. But I will, now, show, that the law provides, that the case may be wholly disposed of, without testimony of any kind. I asked, under my last head, why, if the legislature could require the judiciary to receive testimony on but one side, it might not require it to receive no testimony at all. But it turns out, that the legislative has already encroached to this extent upon the judicial.

This law provides, that the commissioner may dispose of the case wholly on the transcript laid before him. But the transcript and the record, from which it is copied, are utterly void, for the reason, that the State judge could have had no authority to act in the case—Congress not being able to vest judicial power in him.

These transcripts, which come up from the South, are of no more legal value than so many pieces of blank paper. As well may our State judges exercise their judicial powers in behalf of the Government of China, as in behalf of the Federal Government. In neither case could the exercise have

any legal effect. The proceedings before the State judge might be ever so full of perjury, and yet no prosecution for perjury could be sustained. The State judge, having no jurisdiction in the case, could not administer a valid and responsible oath.

My ninth position is, that the law is Unconstitutional, because it fixes the compensation for the loss of the servant at the same sum in all cases.

It cannot be pretended, that such extreme unreasonableness is demanded by the Constitution: and if it is not, then it makes the law Unconstitutional.

This invariable compensation is one thousand dollars. Is it a slave, worth two thousand dollars, whose escape is aided?—the master can get but one thousand dollars. Is it an aged and worn out slave, not worth ten dollars, whose escape is aided?—the master gets one thousand dollars. Is it an apprentice, whose escape is aided, and the remaining time of whose apprenticeship is not worth fifty dollars?—the master gets one thousand dollars. Is the person, whose escape is aided, one, who owes but a month's, or a week's, or a day's labor?—his employer gets one thousand dollars.

Is it said, that the Constitutional clause in question applies to slaves only? I answer, that, whether it does or does not, apply to slaves, it certainly applies to free laborers. Indeed, fugitive apprentices have been returned under this law. Daniel Webster, in his speech at Buffalo, May 22, 1851, says—"The Constitution was formed, established, and adopted in New York by your ancestors. It contained provisions for the security of those who hold others by the right of service. It provided that, in case they escaped from such service, they should be returned. This was the common practice before. Slaves escaping from Virginia into Massachusetts were to be returned. In the North there had been a grand system of apprenticeship, to which this applied as well. This led to a clear, express, unmisunderstandable provision in the Constitution for the return of fugitives." I am aware of the claim, that this provision can apply only to slaves and apprentices, and not to hired persons. But the claim is without foundation. What, if it is contrary to statute law, or common law, or any and all usage, to deliver up a hired person? This avails nothing against the declaration of the Constitution. The Constitution was not shaped to run in the grooves of statute law, or common law, or any usage whatever. It is paramount to them all! And, if the Constitution provides, that the man, who owes but a day's labor, or but a sixpence, shall be delivered up, then, whatever else to the contrary, he must be delivered up.

But, perhaps, it will be said, that, vindictive, or exemplary, damages, or in more vulgar language, smart money, is due, in all cases, where the escape is aided. What? in addition to a fair compensation for the loss of the servant, and in addition, also, to the heavy penalties of the public prosecution?

Is it right to imprison a man for six months, and to make him pay two thousand dollars, besides costs, for no other offence than humanely helping a poor abused apprentice to escape from his cruel master?

Is it not a fact, however, that the courts are getting sick of this doctrine of smart money?--a doctrine, which, I believe, can be traced to no more honorable parentage than the infamous Jeffreys.

My tenth position is, that the law is Unconstitutional, because in the public, or criminal, prosecutions under it, it allows the court no wider range for fixing upon the appropriate penalty.

In every case of conviction, as well where the testimony is scanty, as where it is abundant; as well where the conviction is for the most remote, indirect, and minute agency, as where it is for direct, overt, and most comprehensive acts; and as well where it is for the lowest, as for the highest grade of the offence; the penalty is fine *and* imprisonment--not fine *or* imprisonment; and the court may, of course, order the imprisonment to continue, until the fine is paid. It must be remembered, too, that, in no case, where the conviction is for offences specified in the law of 1793, can the fine be less than five hundred dollars;--for this is the invariable fine imposed by that law;--and the laws of 1793 and 1850 make but one law--the latter being but supplementary to the former. That, in such case, each law stands, and is in full force, so far as it is not contradicted by the other, is a principle with which all lawyers are familiar. Blackstone recognizes it in the third section of his first volume.

My eleventh position is, that the law is Unconstitutional, because it extends to matters entirely beyond and foreign to the Constitutional clause, which it purports to carry out.

For instance, the Constitutional clause requires only the delivering up of the fugitive:--but the law provides, that he may be taken back, at the expense of the nation, to the State or Territory, from which he escaped. The Constitution leaves the master to take back his servant, without help, or with the help of the neighbors and friends, whom he may have brought with him. But the law provides the master with a national guard to escort the servant, it may be, from Maine to Texas; and at an expense to "the treasury of the U. States" of thousands of dollars.

Again, the Constitutional clause provides for cases of escape to and from a State only:—but the law extends to escapes to and from Territories, and from the District of Columbia.

Is it said, that the Constitutional clause should be interpreted liberally? I answer, that every constitution and every law should be interpreted liberally in behalf of justice and liberty—but strictly against injustice and slavery.

Possibly, it may be argued on this occasion, that our Territories and the District of Columbia are, each of them, a State. I admit, that they are, in

the sense, in which the word is used by writers on the laws of nations: but I deny, that they are in the sense, in which the word is used in the Constitution.

Kent says, at page 424, vol. 1st of 7th Ed. of his Commentaries: "Neither the District, nor a Territory, is a State within the meaning of the Constitution, nor entitled to claim the privileges secured to the members of the Union. This has been so adjudged by the S. C. in the case of Hepburn and Dundas against Elizey, 2d Cranch 445, and also in the case of New Orleans against Winter, 1st Wheaton 91." In the latter of these cases, C. J. Marshall, who delivered the Opinion of the court, says: "Neither of them (that is the District of Columbia or a Territory) is a State, in the sense, in which that term is used in the Constitution." In the former case, C. J. Marshall, who delivered the Opinion of the court, says: "It becomes necessary to inquire, whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction, that the members of the American Confederacy only are the States contemplated in the Constitution.

The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have, at least, one representative.

The Senate of the United States shall be composed of two Senators from each State.

Each State shall appoint for the election of the Executive a number of electors equal to its whole number of Senators and Representatives.

These clauses shew, that the word State is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the laws of nations.

It was decided in the same case, that a citizen of the District of Columbia cannot maintain a suit in a Circuit Court of the U. States. And in the suit of N. Orleans against Winter, the Court says: "this opinion (respecting incompetency to maintain a suit, &c.) is retained."

My twelfth position is, that the law is Unconstitutional, because it recognizes the Constitutionality of slavery in the Territories.

There cannot be slavery in the Territories—for the Territories are under the exclusive control of Congress; and Congress is under the exclusive control of the Constitution; and the Constitution is such, that slavery can neither be set up, nor suffered, under it. The institutions of a Territory must harmonize with the Constitution. So far, as they are repugnant to it, they are destitute of legal force.

At the page referred to, under my last head, Kent says: "Congress have supreme power in the government of the Territories." C. J. Marshall says: "All admit the Constitutionality of a Territory." Wheaton iv. 422.

My thirteenth position is, that the law is Unconstitutional, because it recognizes the Constitutionality of slavery in the District of Columbia.

No intelligent person believes, that Congress has the right to set up slavery in the District of Columbia, or, indeed, any where else. It has been

well said: "Congress can no more make a slave than a king." Surely, the right to set up slavery cannot be derived from a Constitution, which declares that one of its objects is "to establish justice and to secure the blessings of liberty;" and which also declares, that "no person shall be deprived of life, liberty, or property, without due process of law"—meaning, as is manifest, judicial process. The consequences of conceding the right of Congress to set up slavery in the District of Columbia, would be numerous, startling, and revolting. If Congress has this right, then, according to the words of the Constitutional clause, which respects the District of Columbia, it has, also, the right to set up slavery in every place, and on every spot of ground, which the General Government has purchased, or may yet purchase, with the consent of the Legislature of a State. It may set up slavery, not only in the Forts of our State, as, for instance, in the Forts at Oswego and Buffalo, but in all the Post Offices and Court Houses belonging to the General Government. Chained, and whipped, and branded, and mutilated slaves may be employed in the Post Office of this city of Syracuse to receive and deliver letters and papers.

But, notwithstanding the notion, that Congress has the right to set up slavery in the District of Columbia, is confessedly preposterous, it is, nevertheless, claimed that the slavery, which pollutes that District, has a rightful and Constitutional existence. It is so claimed on the ground, that it is Virginia and Maryland slavery. But this claim is sheer nonsense. The laws of the States have no more power in the District than they have in Russia. The legislation of the District is vested exclusively in Congress; and slavery in the District exists simply by the force of Congressional legislation.—This exclusive vesting of such legislation was strenuously objected to, in some quarters, at the time of the adoption of the Constitution. In the Virginia Convention, which passed upon the Constitution, it was protested against by such men as Grayson, Mason, and Patrick Henry. Henry called the authority and power over the District given by the Constitution to Congress, "illimitable authority," "unlimited power." Indeed, that Convention went so far, as to propose an amendment to the Constitution limiting the power of Congress over the District "to such regulations, as respect the police and good government thereof." And it must be borne in mind, that it was before Virginia and Maryland ceded their respective portions of the District, that this amendment was rejected; and that, hence, their cessions were made in the light of the interpretation, which the American people did, by that rejection, put upon the clause of the Constitution, which respects the District of Columbia.

But, it is said, that Virginia and Maryland ceded the territory with the condition, that slavery should not be disturbed therein. In answer to this we say, that no such condition was expressed; and that, if it had been, it

would have availed nothing. The paramount words of the Constitution would have made the condition nugatory. Those words governed Virginia and Maryland in making, as well as Congress in accepting, the cessions. The Constitutional clause in question was the mould, and the only mould, which could give form and features to the cessions. And that the cessions were made, as well as accepted, under the Constitution, was virtually acknowledged by both Virginia and Maryland;--for in the laws, by which they made the cessions, they declared that they made them "in pursuance of "the Constitutional clause in question. It is true, that there is in the Virginia law a vague proviso—not touching, however, nor, as far as I can see, aiming to touch, the question of slavery. But for the reason I have already given—that is, for the reason of the controlling language of the Constitution—this proviso is entirely void; and what it means can, in no event, be of any possible consequence. But, in reality, it was not necessary for me to say one word on this point. For that part of the district, ceded by Virginia, has been retroceded, and is, again, a part of Virginia. And, inasmuch, as the retrocession took place before the fugitive servant law of 1850 was enacted, it follows, that the District of Columbia does, in the eye of this law, consist solely of the cession made by Maryland—a cession made without any proviso or reservation whatever. There is, then, not the least possible ground for claiming, that slavery in the district of Columbia is Constitutional;—and, hence, the fugitive servant law of 1850 is necessarily Unconstitutional.

Possibly, it will be said, that this law of 1850 does not refer to slaves but only to free laborers: and that, hence, as there are free laborers, as well in the District as in the States, the law is not rendered Unconstitutional by its mention of the District. To this objection I would reply: 1st. The clause in the Constitution does not mention the district; and, hence, the law had no right to mention it; and is Unconstitutional for having mentioned it. Moreover, the District, not being mentioned in the clause, the clause does not refer even to free laborers in the District. 2d. If the clause does not refer to slaves, then, as I have shown under a former head, its penalties are so enormous in all cases, as to render the law Unconstitutional. 3d. If the law does not refer to slaves, then, as I shall show, under a future head, the law, however Constitutional it may be, leaves the prisoner necessarily and nakedly a kidnapper.

It may, also, be said, that if the law is Unconstitutional in providing for escapes from the District, nevertheless, the whole law is not violated thereby, but remains in force, so far as it respects escapes to and from States.

It may be right, in ordinary cases, to retain so much of a law, as can operate Constitutionally; and to fling away only the remainder. But, where, as in the present case, the Unconstitutional feature is one, that

outrages human rights, and insults the cause of freedom, there the honor of the Statute Book, and the safety and honor of man require the indignant flinging away of the whole law. We are to read this law, just as if it called on the marshal, in terms, to obey and serve a precept for enslaving freemen of the District of Columbia--and if freemen of the District, then, just as well, freemen of Massachusetts. But, if this plain and proper translation of this absurd and infamous law be adopted, what judge would, then, hesitate to turn his back upon the whole law?

Again, should a law be retained upon the Statute book, which requires the minister or executer of the law to do, and that, too, under a heavy penalty, what he will be Constitutionally, and severely punishable, for doing? Now, this law tells the marshal to seize for enslavement a freeman of the District of Columbia--and to do so, or pay one thousand dollars;—whilst, at the same time, a Constitutional law of the State of New York rings in his ears, that if he obeys this Unconstitutional law of Congress, he shall be fined and sent to State Prison.

I might, in my argument, have classed the Territories with the Districts, inasmuch as the marshal would be equally punishable for arresting, as slaves, fugitives from a Territory.

My fourteenth position is, that the law is Unconstitutional, because it undertakes to suspend the writ of Habeas Corpus.

I have read the argument, which the Attorney General of the U. S. made to persuade the President of the U. S., that the law is not Unconstitutional, in this respect. His reasons for concluding, that the law does not forbid the writ of Habeas Corpus (among which reasons are, 1st, that to forbid it would violate the Constitution; and 2d, that such violation should not be imputed to Congress!) are quite too flimsy for so high a functionary to employ.

What mean the two lines, at the close of the sixth section of this law—"And shall prevent all molestation of said person or persons by any process issued by any court, judge, magistrate, or other person whomsoever?" If they do not mean to shut out the writ of Habeas Corpus, then what do they mean? The Attorney General says, that they "probably" mean only what the act of 1793 means, by declaring a certificate under that Act a sufficient warrant for the removal of a fugitive. But I wonder at his having the face to say so; for the two previous lines have this meaning. Of course, then, the two last lines mean something else. If they do not, then they are mere surplusage: and the imputation of surplusage to a law must be avoided, if possible. What, however, is this something else, if it is not the suspension of the writ of Habeas Corpus?

But, is it a violent supposition, that a law, which disposes of one's right to his liberty for life--to his manhood for life—"in a summary manner," by

exparte testimony, and even by no testimony—I ask, is it a violent supposition, that such a law would not stop short of suspending the Habeas Corpus, in order to carry out its despotism?

To say the least, it is not certain, that this law does not deny the habeas corpus. Many able judges and lawyers have no doubt, that it does. Even the President of the United States had the suspicion, that it does—a suspicion so strong, that it required the Attorney General of the United States to remove it. Would it be strange, then, if, in such circumstances, there should be found, here and there, and now and then, a Judge ready to refuse this writ, and to suffer his fellow man to be plunged into slavery, without further investigation? Now, if a law is so framed, as to make it but uncertain, in the eyes of many able lawyers and judges, whether it preserves the writ of habeas corpus, it should be held to be Unconstitutional and void for uncertainty. There should be no suffering of uncertainty in regard to the preservation of that writ which Blackstone so well calls "the most celebrated writ of England and the chief bulwark of the Constitution." Is there a law, which makes it uncertain whether a particular crime is to be punished by fine or imprisonment? Who would deny, that such a law is void for uncertainty? But why is such a law void any more than a law, which leaves it uncertain whether it acknowledges or denies the great writ of Habeas Corpus?

It is sometimes said, that we are not to be concerned to have this law declared Unconstitutional, even if it does forbid the writ of Habeas Corpus; for the Constitution, being paramount, will prevail against it at this Unconstitutional point. But, if this is a good reason for not declaring this law Unconstitutional, an equally good reason is it for not declaring any law Unconstitutional.

My fifteenth position is, that the law is Unconstitutional, for the reason, that Congress has no right to legislate upon the subject.

The Constitutional clause respecting fugitives from service was taken from the Ordinance of 1787. No one pretends, that, as a part of the Ordinance, it conferred any power on the Government. Why, then, should it be regarded as standing in a different relation in the Constitution?

This clause is found in the Constitution, in connection with three clauses, which were taken from the Articles of Confederation. No one pretends, that these three clauses conferred any power on the Government. All four of the clauses [article 4, sections 1 and 2,] are clauses of compact between the States, and they depend for their observance solely on the good faith of the States. Indeed, the Ordinance of '87 does itself call this clause a clause of compact. Its words concerning its six articles, of which this is one, are, that they shall be "a compact between the original States and the people and States in the said Territory, and forever remain unalterable, except by common consent."

Nathan Dane, of Massachusetts, framed the Ordinance of '87. Where did he find this provision respecting fugitive servants? He copied it from an old clause of compact—as old as 1642—between Massachusetts and the other Colonies around her.

On one of these four clauses of the Constitution, Congress has the right to legislate, for that clause contains an express grant of power to legislate. That such grant of power is lacking in the three other clauses, implies, irresistibly, that upon them Congress has no right to legislate. Is it said, that such grant is to be inferred in the case of the three clauses? Then, might it have been inferred in the case of the other clause also; and then the expression of it in that case is mere surplusage; and so, also, in that case, is the expression of such power, at the close of the 9th section of the 1st article of the Constitution.

It can be seen, at a glance, that, in the case of this clause, where power to legislate is given to Congress, it is in the very nature of the case indispensable, that such power should be given. But not so in the case of the three other clauses. In this case, where power to legislate is granted to Congress, State legislation would not suffice. There must be national legislation in this case, for it would not be competent for a State to direct in what manner its own public acts, records and judicial proceedings should be authenticated in another State. Each State (the rule of evidence being *lex loci*) might require a different mode of authentication. Hence, there must be a uniform mode of authentication in all of the States—that is, a mode determined by Congress. The necessity for Congressional legislation, in the case of this clause, is the reason, in the judgment of C. J. Hornblower, why this clause was put in a section by itself, and not in the same section with the three other clauses. [State of New Jersey *vs.* Sheriff of Burlington, 1836.]

But Congress has legislated, not only in regard to the clause, in which it has the right to legislate, but in regard to two of the other three clauses. Why, then, in the name of consistency, has it not legislated in regard to the remaining clause also—the clause assuring the citizens of each State of their rights in the several States? The only answer is, that the slave power tramples upon this clause, and forbids Congress to give force to it.

It is only, however, in the case of the fugitive servant clause, that Congress claims, that any one of these four clauses is to be carried out by other than State action. The law of Congress, in the case of the clause respecting fugitives from justice, is, indeed, a usurpation of power. Nevertheless, as it virtually disclaims all right on the part of the Federal Government, and virtually recognizes all right on the part of the State Government, to do what the clause requires to be done, the usurpation is not so much to be regretted.

When, in the Convention, which framed the Constitution, it was proposed

to insert a clause respecting fugitive slaves, the proposition was to have them "delivered up like criminals"--that is, by State action. [Madison Papers 111: 1447.] Not one line, whether of public or of private records, has ever been produced to show, that in 1787, when the Constitution was framed, or that in 1789, when it was adopted, any person believed, that the clause contains a grant of power, or is any thing else than a compact between the States.

I repeat what I have said: these four clauses (and the fugitive servant clause as much as the others) bind the good faith of the States; but, in no event, do they impose any obligations on the General Government, save to the extent of the special grant in the case of one of the clauses. If the States are guilty of delinquency in respect to these clauses, I know of no remedy for it in the hands of the General Government. That Federal power may be used to supply the delinquencies on the part of the States, is a doctrine leading directly to centralization, consolidation, and the subversion of the rights of the States.

Both of the fugitive-clauses require a delivering up. Now, Congress admits, that the delivering up, in one case, is to be by State action. Why, then, should it deny, that, in the other also, it is to be by State action? There is not one reason for this distinction; and but one shadow of a reason for it. This shadow of a reason is the prohibition contained in the clause. But this prohibition upon the State to enact a law, discharging the fugitive, is a prohibition of State action, at one point only. Prohibition, however, at one point, so far from implying prohibition at every other point, implies permission at every other point: *Exceptio probat regulam* is a maxim, which applies in this case. The prohibition on the State to legislate or act, in one respect, implies the right of the State to legislate or act, in every other respect. This prohibition is precisely analogous to the prohibition upon the States to pass laws impairing the obligation of contracts. But none claim, that the prohibition, in the latter case, implies, that the State may not legislate at all, in regard to contracts. It implies the reverse. Whatever extent of State action, however, the prohibition, in either case, may imply, certain it is, that, in neither case, does it imply the right, least of all the exclusive right, of the Federal Government to act in the premises.

But it is held, that the great questions connected with slavery are all settled by decisions of the S. C. of the U. S.—that they are fully and finally adjudicated—and are never more to be disturbed. I respect precedent. I would, to every reasonable extent, bow to it. I cheerfully admit the general proposition, that the decisions of the supreme judiciary are to be regarded

as conclusive —at least, for many years. But I deny, that decisions of any, even the highest, earthly tribunal against fundamental, unchangeable, eternal human rights are ever, even for one moment, to be regarded as final and unalterable. Most emphatically true is this, when such decisions are in favor of slavery, and of sweeping away (as slavery does,) all human rights, and converting immortal, God-like man into a brute and a thing. If the S. C. of the U. S. shall, at any time, feel itself bound, by its view of the requirements of the Constitution, to decide for slavery and for the annihilation of human rights, it is, to say the least, to decide so, very reluctantly; and it is, moreover, ever after its decision, to welcome every attempt, however speedily or frequently made, to inspire it with such views of the Constitution, as shall enable it, conscientiously, to reverse its decision.

But I should be disingenuous to stop here, and give no further reason against the conclusiveness of pro-slavery decisions of the S. C. of the U. States. Such decisions are, in my esteem, entitled to very little respect. Why should they be, when a majority of its members (oh shame to my country!) are themselves slaveholders?—do themselves defend the traffic in human flesh? Who would respect the decision of a Court against the Constitutionality of the "Maine law," were a majority of its members distillers? Not only is it true, that slaveholding blunts and warps the sense of natural justice; but it is also true, that, where slavery is the subject to be adjudicated, slaveholders will not do as well, as they might, even with that blunted and warped sense. They will perversely refuse to follow the guides, and submit themselves to the principles, of enlightened jurisprudence. A rare man, like John Marshall, may, to a great extent, rise above the influence of his circumstances and relations.

But, to return from this digression—where is it, that the S. C. has disposed of these great questions? In the Prigg case, is the reply. That is the case [Peters xvi.] relied on to sustain the proslavery constructions of the Constitution, and, especially, the position, that Congress has exclusive right to legislate on the fugitive servant clause of the Constitution. We will examine this case; and, I think, we shall find, that quite too much has been claimed for it; and that it settles very little, if indeed any, of all, that it is supposed to settle.

Edward Prigg, of Maryland, was indicted and convicted in Pennsylvania. The case was brought by writ of error before the S. C. of the U. S. The record set forth the special verdict of the jury, and it also set forth the statute, which Prigg was convicted of violating. The statute is aimed against those, who shall remove a person from Pennsylvania, with "the intention and design of selling and disposing of, or of causing to be sold, or of keeping and detaining * * * * as a slave" the person so removed. But of this vital part of the statute the verdict says nothing. Justice Story,

in delivering the Opinion of the Court, says: "It (the statute) purports to punish, as a public offence against that State the very act of seizing and removing a slave by his master." "He adds: "The special verdict finds this fact; and the State Courts have rendered judgment against the plaintiff in error upon that verdict." But what Justice Story says of "the statute is not true. It is for doing more than he says, that the statute purports to punish, &c."

We proceed in our examination of the case. The only question before the Court was, whether Prigg could seize and remove the person, without the aid of any legislation, whether of Congress, or of a State; or, in other words, without any process; or, in still other words, whether the fugitive servant clause is self-executing. On this only question before it, the Court stood eight for reversal, and one (Justice M'Lean) for affirmance. But, with the exception of Justice Baldwin, who confined himself to the case before it, the Court formally discussed, and formally passed on, other questions. Eight members of the Court held, that Congress may legislate on the clause in question. Five members of the Court (Justice M'Lean one of them) held, that Congress has exclusive legislation in the case. Three members of the Court held, that the States have concurrent legislation. One of the three (C. J. Taney) said: "It, (the fugitive servant clause) contains no words prohibiting the several States from passing laws to enforce this right. They are, in express terms, forbidden to make any regulation, that shall impair it. But there the prohibition stops And, according to the settled rules of construction for all written instruments, the prohibition being confined to laws injurious to the right, the power to pass laws to support and enforce it is necessarily implied."

In his speech in the Senate, March 7th 1850, Daniel Webster said: "I have always thought, that the Constitution addressed itself to the Legislatures of the States themselves, or to the States themselves. I have always been of the opinion that it was an injunction upon the States themselves. * * * The State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained it, and I entertain it now."

Chancellor Walworth said: "I have looked in vain among the delegated powers of Congress for authority to legislate upon the subject." Wendell xiv., 522. The Chancellor spoke soundly—nevertheless, unfortunately for himself, as it turned out, when a judge of the S. C. of the U. S. was to be selected from the State of New York: and Judge Nelson, in the same case, in another Court (Wendell xii. 314), spoke unsoundly—though fortunately for himself, as it turned out, when this selection was to be made.

But the Opinion of the Court in the Prigg case should, to be consistent with itself, admit, that the States can legislate upon the clause in question. "None (no doubt)," says the Opinion, "is entertained by this Court, that State magistrates may, if they choose, exercise that 'authority'"—i.e. delivering up slaves. Peters xvi. 622. But, "if State magistrates may, if they choose," act upon this clause, why, then, may not State Legislatures, also act upon it, "if they choose?" But the Court involved itself in utter absurdity, at this point. If the Federal Government only has jurisdiction of this clause, and so the Court (if the Court it was) maintains, then neither a State Legislature, nor a State magistrate, can act upon it. The Federal Government, in that case, can no more look for action, or tolerate action, beyond its own sovereignty than could the State of New York permit magistrates on the Canada side of the frontier to participate in its judicial

concerns. The judicial power of the Federal Government is vested in Federal officers only: and that Government can no more suffer such power to be shared in by judicial officers of another sovereignty than by military officers or private citizens."

Justice Story delivered the Opinion of the Court in the Prigg case. He discussed the extraneous questions as if they were all pertinent and material to the case; but if they were all pertinent and material to it, then I see not with what propriety it is held, that the judgment of Pennsylvania was reversed. For, not counting Justice McLean, there were but four of the nine Judges in favor of the position, that Congress only can legislate on the clause in question. On the other hand, if these questions, which I call extraneous, were not pertinent and material, then it follows, that the Prigg case, if indeed it has decided any thing, has, at the most, decided but one thing—the one thing, that the fugitive servant clause is self-executing, and may be carried into effect without the help of process. Whatever was said by the Court on other points was mere *obiter dicta*, and was, to no extent, an adjudication.

There is no right, then, to say, that the Prigg case decided, that Congress has exclusive or even concurrent legislation on the fugitive servant clause and no right to say, that it decided the law of 1793 to be Constitutional. But, even had it decided the law of 1793 to be Constitutional, it would not follow, that the law of 1850 is thereby decided to be Constitutional; for the law of 1850 is far from being identical, either in its principles or provisions, with the law of 1793. The law of 1850 provides, that the fugitive be taken before a Federal magistrate only; but the law of 1793 provides, that he be taken before either a Federal or a State magistrate.

Perhaps, it will be said, that, in the case of Jones against Van Zandt, (Howard v. 216,) the Supreme Court of the United States decided the law of 1793 to be Constitutional. But the point was not argued nor examined. The Court, in common with the whole country, was under the mistaken impression, that the point had been decided in the Prigg case; and hence, the Court referred to it as a settled adjudication. Of course, no authority nor precedent can grow out of a mistake, be the mistake in the Prigg case, or Van Zandt case, or both. But this mistake of the Court in the Van Zandt case should effectually warn all Courts of the danger of suffering their Opinions to range beyond the limits of the case before them.

Judge Woodbury, in declaring the Opinion of the Court in the Van Zandt case, says: "This Court has already, after much deliberation, decided, that the act of February 12th, 1793, was not repugnant to the Constitution. The reasons for their Opinion are fully explained by Justice Story in Prigg *vs.* Penn., Peters xvi. 611." Again, Justice W. says: "That this act is not repugnant to the Constitution must be considered, as among the settled adjudications."

My sixteenth position is, that the fugitive servant act of 1850 *is Unconstitutional, because the Constitution is anti-slavery, and not pro-slavery.*

But, after all, is this act pro-slavery? Is it an act for reducing persons to slavery? I admit, that it is not such upon the face of it. I admit, that it does not speak expressly and literally of slavery. Nay, I will, for the sake of the argument, admit, that the act is in no wise pro-slavery, and that, so far as slavery is concerned, it is Constitutional and valid law. I will go still farther and say, that it is, in all respects, good and sound law. But how can such admissions help the prisoner? It would be fatal to him to use them,

for he confessedly treated the act as an act for slavery; and, under it, he sought to sink poor Jerry into slavery. Hence, if the act is not an act for slavery, the prisoner stands before the Court, necessarily and nakedly, a kidnapper.

In order, then, for the prisoner to make even a show, even a beginning of defence, he is compelled to assume, that the act of Congress, which he was employed in enforcing, is an act for plunging persons into slavery; and moreover, that the act is authorized by the Constitution.

I have now, therefore, come to that stage in my argument, in which I shall undertake to show that the Federal Constitution sanctions no slavery, permits no slavery, knows no slavery. If I succeed in showing this, it of course follows that, whether my previous arguments are or are not sound, the fugitive servant act of 1850 is Unconstitutional and void.

[Mr. Smith spent a couple of hours in arguing the Unconstitutionality of slavery. He frequently quoted from his own published writings, and from those of Lysander Spooner. Whoever will be at the pains to read the little pamphlet entitled "Gerrit Smith's Constitutional Argument," and the large and incomparably more valuable pamphlet entitled "The Unconstitutionality of Slavery, by Lysander Spooner," will conceive a sufficiently just idea of the course and character of Mr. Smith's argument under this head.*]

My seventeenth and last position is, that the law is Unconstitutional, because the Constitutional clause, which it purports to carry out, does not refer to slaves.

Perhaps, it will be said, that the Supreme Court has decided, that this clause does refer to slaves. But if it has, then, for the reasons, which I gave under a former head, the decision should be kept ever open for reversal, and the Court should ever welcome every attempt to convince it, that such decision can, without violating the Constitution, be made to give place to a decision in harmony with everlasting righteousness.

When, however, did the Supreme Court decide, that this clause refers to slaves? When did the question ever come before that tribunal? Not in the Prigg case, nor in the Van Zandt case. In both these cases it was assumed, that the clause does refer to slaves.

If I succeeded, under my last head, in showing that American slavery is Unconstitutional, then of course "the laws" referred to in this clause cannot be laws for slavery; for if the Constitution is anti-slavery, then there cannot be pro-slavery laws—then pro-slavery enactments cannot be laws. But I will admit, for the sake of the argument, that I failed to prove the Constitution to be anti-slavery. Nevertheless, the clause, which we are about to examine, is not to be regarded as pro-slavery, because some other, or even because every other part of the Constitution is pro-slavery.

Had there been no slavery in the country, at the time the Constitution was adopted, and no prospect of there ever being any, this clause would still have been proper. Apprentices have been reclaimed under it, and fugitives from the various classes of free laborers can be. Indeed, the clause must be taken as referring to such. It cannot refer to slaves, for the fugitives in the clause are capable of owing, and slaves can no more owe than horses, or horse blocks. In the eye of the slave code, the slave is a mere chattel.

Another reason why the fugitive in this clause is not a slave, is, that he

* Mr. Spooner's pamphlet is for sale by Frederick Douglass, of Rochester, and by Bela Marsh, of Boston.

is there described as a person, and "no person," says the Constitution, "shall be deprived of life, liberty, or property, without due process of law."

Another reason why the fugitive in this clause is not a slave, is, because he is held to service under the laws. But the laws no more hold a slave than an ox to labor. They admit and defend the owner's right of property in both; but they no more compel the slave than the ox to perform labor.—A person held to labor by the laws, is, surely, no definition of a slave.

Are the "laws" referred to in the clause only those laws, which were in existence at the time the Constitution was adopted, or do they include the laws, which might be enacted thereafter? Are they only the then existing laws? Then does analogy require us to interpret "State" in the clause as only a then existing State; and hence, here would be two reasons for concluding, that Jerry could not possibly come within the scope of this clause, for neither the laws of Missouri, nor the State of Missouri, were in existence, at the time the Constitution was adopted. But do "the laws" referred to mean future as well as present laws, and are they laws for slavery? Then it follows, that our fathers bound themselves and their posterity to treat, as slaves, whomsoever any of the States might thereafter enact to be slaves—white or black, good or bad, high or low. Then it follows, that we should be bound to seize and replunge into slavery the scores of white families, who have recently removed from this State to Virginia, should that State enact, that they are slaves, and should they, therefore, fly back to this State.

Another reason, why this clause of the Constitution cannot refer to slaves, is, that the Constitutional provision for the free exercise of religion forbids such reference. This provision does not mean every kind of religion. There is no room under it for a polygamy-religion—no room under it for a religion, which burns the wife to honor the memory of the husband. It means but the Christian religion—the religion of those, who adopted the Constitution. The mention of Sunday in the Constitution indicates this. What, then, is this free exercise of religion, which the Constitution secures to us? Is it liberty to hold what creed we will, and join what Church we will, and observe what forms of worship we will? It is infinitely more than this. It is liberty to be and do what Jesus Christ would have us be and do. It is, in a word, liberty to be and do what Jesus Christ, were he again on the earth, would again set us the example of being and doing. Would He chase down poor innocent men and women to enslave them? Horrid supposition! Blasphemous thought! But why more horrid, why more blasphemous, than that His disciples should do so? If the Constitution requires them to join in that diabolical chase, then it is idle to say, that the Constitution secures to them the free exercise of religion.

And now, are we willing to believe, that our fathers intended to make this whole land the slaveholders' hunting ground, and to require "all good citizens to aid and assist" in running down the innocent human prey? Are we willing to believe, that they were the most merciless of all men? We are wont to contrast the Christian with the Jewish code. Nevertheless, under the latter, the escaping servant was not to be returned to his master, but was allowed to choose his residence. Even the Spaniards were so merciful, as to exempt from reclamation those fugitive Moorish slaves, who were able to reach Grenada. But, under the pro-slavery construction of the Constitution, not so much as a Grenada is left to the American slave. Under that construction, it is held, that he may be pursued throughout our own nation, and into foreign nations also. In the year 1826, our Government had the

audacity to propose, that the British and Mexican Governments should surrender the American slaves, who had fled to Canada and Mexico.

This clause of the Constitution is called one of the compromises of the Constitution; but there is not the slightest reason for calling it such. No reference whatever was made to the subject of this clause in any of the plans of a Constitution, which were submitted to the Convention. Indeed, it was not until twenty days before the close of the Convention, that this subject was introduced into it.

I said, that there is not the slightest reason for calling this clause a compromise. I meant, that there is not for pro-slavery men to call it such.—There is, however, abundant reason, why anti-slavery men should give it this name. When the clause was first proposed, it had the word "slave" in it; but in that shape it was so strenuously opposed, that it was withdrawn. The next day, it was proposed again, but with the word "slave" struck out; and then every member of the Convention unhesitatingly acquiesced in it. The anti-slavery members of the Convention (and nearly all of the members were anti-slavery,) were willing, that the slaveholders should get from the clause, in its amended form, what they could get from it; and certain it is, that, neither in the light of the letter, nor history, of the clause, are they entitled to get aught from it.

Again—To call this clause a pro-slavery compromise, is to do so at the expense of stigmatizing the Convention with the rankest and most glaring hypocrisy; for we must remember, that it was not until after the adoption of this clause, that the Convention struck out from their agreed-upon-form of Constitution the word "servitude," and unanimously inserted in its place the word "service"—and this, too, for the avowed reason, that "the former expresses the condition of slaves, and the latter the obligations of free persons."

My argument is ended. How came this grossly Unconstitutional law to be enacted? How came such able lawyers as Clay and Webster to favor its enactment? The solution is, that they acted in the case, not as lawyers, but as politicians. They had a compromise to make; and make it they must, and make it they did, at whatever expense to an oppressed and outraged race, and at whatever expense to their reputation as lawyers. Even a very great lawyer, when he has consented to merge the lawyer in the politician, can make sad havoc of law. For instance, Daniel Webster pronounced the escape of poor Shadrach of Boston, a treasonable act—a levying of war against the United States!—and that, too, though no weapon was seen, and no one hurt, and no one threatened with hurt! Again, in the Christiana case, the District Attorney was especially instructed by the Department of State "to ascertain whether the facts would make out the crime of treason against the United States, and, if so, to take prompt measures to secure all concerned for trial for that offence!"

I said, that my argument is ended. I need not consume more time in showing, that our fathers, who created the American Government, created it "to establish justice and secure the blessings of liberty," and not to be a gigantic slave-catcher, and to expend in slave-catching the contributions, which honest toil is compelled to make to the national treasury. I need not add, that their willingness to have their Government and treasury put to such cruel and shameless and infamous uses, proves, that the American people have fallen down into very low depths of degeneracy and depravity.

This argument, with which I have so heavily taxed the patience of the Court, adds another to the very numerous efforts I have, during the last fif-

teen or twenty years, put forth to arrest the ruinous career of this nation. But, in all probability, it is now too late for any poor efforts of mine, or even for the best efforts of the best men, to have any effect in arousing and saving this insane and guilty nation. In all probability, it will continue to drive on, heedless of warning and entreaty, until engulfed in destruction.—There is but too much reason to fear, that the slave power has already achieved a fatal and final conquest over the understanding and heart of the American people. The American people have become so familiar with the stupendous crimes of that power, and so debauched by their long course of acquiescence in them, as no longer to be shocked by them, and, indeed, as no longer to discern them. They not only assent to this hideous and Heaven-defying law for chasing down and enslaving Heaven's unoffending and guiltless poor, but they bestow most favor and honor upon those, who are most the champions and upholders of this law. And such blindness has come upon them, that of the still more cruel and murderous laws enacted, or about to be enacted, by this, that and the other State, they do not so much as take notice. The decision of the Supreme Court of the United States in the Prigg case, startled the nation. Not only, however, is the nation now reconciled to it, but it is regardless, and probably unaware, of the far greater lengths, which that Court has gone in its devotions to the bloody Moloch of slavery. Scarcely eighteen months have passed away, since that Court decided, in the case of Strader and others against Graham, that a State is at liberty to make slaves of freemen, and "has an undoubted right to determine the *status*, or domestic and social condition of the person domiciled within its territory." Pro-slavery decisions and pro-slavery laws are weaving a strong net-work around the American people, which will leave them bound and helpless at the feet of the slave power. Nevertheless, they remain entirely unconscious of the encroachments upon their rights—entirely unconscious of the invasions of those great and immutable principles, on which all their rights are founded.

This doctrine of the Supreme Court of the United States, that rights, the most cherished and sacred, the most essential and vital, stand but in the concessions and uncertainties of human legislation, is a legitimate outgrowth of slavery. This doctrine, in other words, is, that there are no natural rights. Slavery is a war upon nature, and is the devourer of the rights of nature; and wherever, as in this country, it is in the ascendant, all rights and all interests, conventional as well as natural, accommodate themselves to its demands. The doctrine of natural rights, if it can live at all in a country, which cherishes slavery, nevertheless cannot have an extensively influential and practical existence in it. In this country, it is reduced to a mere theory or speculation; and never can it be more, so long, as we admit that enactments for the destruction of natural rights are laws—valid, obligatory laws.

It may be too late for America to learn the lesson—nevertheless, it is a lesson of truth, and of unspeakably important truth, that no people can be secure in their rights any further than they believe, that their rights are derived from God; nor any further than they believe, that laws to be valid and obligatory, must be laws for the protection, instead of the destruction, of rights.